U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19121033

Date: SEP. 15, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree but that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

We dismissed the subsequent appeal, concluding that the Petitioner has not sufficiently demonstrated the national importance of her proposed endeavor under the first prong of the analytical framework described in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). The matter is before us again on a combined motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion.

I. LAW

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

We concluded on appeal that the documentation in the record does not establish the national importance of the Petitioner's proposed endeavor, as required by the first *Dhanasar* prong. We will address the merits of the motion to reopen and the motion to reconsider separately.

First, our decision summarized the proposed endeavor as follows:

> The Petitioner indicated that she intends to start a physical therapy business which "will perform all types of prescribed physical therapy at our clinic or in a patient's home" and "also offer fall prevention therapy to people over 55 that struggle with balance" in Florida.
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> . . .
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> On appeal, the Petitioner claims that her proposed endeavor is of national importance and "stands to produce benefits beyond the company's prospective patients, employees, and group class participants" generally because of "the importance of healthcare and physical therapy, coupled with the shortage of professional[s] in that field[,] as well as an excess expenditure of people with physical therapy problems."
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> . . .
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> [T]he Petitioner's business plan anticipates that it will have "14 employees in our first year," including physical therapists, physical therapy aides and office personnel, and "will grow to 19 employees by Year 5." In addition, the plan projects $789,000 to be paid in Federal, State, and payroll taxes in the next five years.[1]

A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

We concluded in our decision that "the Petitioner has not demonstrated that the specific endeavor she proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial

[1] The Petitioner also provided information regarding regional input-output multipliers (RIMS) and states that, "[b]ased on the calculators, [her] endeavor will create 13.5 jobs in the first year of operation[,] growing to 34 jobs in the fifth year."

positive economic effects for our nation as contemplated by *Dhanasar*." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

On motion to reopen, the Petitioner resubmits a letter from the managing director of [redacted] regarding her preparation of the Petitioner's business plan. The Petitioner asserts on motion that the letter "will corroborate . . . that the proposed endeavor will create 34 new jobs in the [redacted] FL[,] region . . . if direct and indirect jobs are considered." At the time of our decision, the record contained a copy of that letter, dated December 2019, and the business plan. Because the record contained that document at the time of our decision, and because we considered the record in its entirety at the time of our decision, the resubmitted document does not present a new fact on motion.

Next, the Petitioner submits in support of the motion a seven-page printed copy of a webpage from Invest in the USA, titled "Targeted Employment Areas: Bringing Investment and Opportunity to American Communities." Although the Invest in the USA document does not indicate when it was written, it references "new regulations published by the U.S. Department of Homeland Security [that] went into effective [*sic*] on November 21, 2019." Therefore, the document appears to have been written after the petition filing date in 2018. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Moreover, even to the extent that the document may establish eligibility, it does not address the Petitioner's endeavor or any particularly targeted employment area.

Relatedly, the Petitioner asserts in her motion brief that "[t]he Petitioner's endeavor would be located in [redacted] FL. Such area is considered a Targeted Employment Area." The brief includes a printout of a map of [redacted] Florida, and their suburbs. However, the map indicates that only certain areas of the greater [redacted] metropolitan area are designated as either a "TEA: Single-Tract High Unemployment Area (HUA)" or a "TEA: HUA When Combined with Adjacent Tract(s)," whereas a substantial portion of the area is designated as "Not a TEA." The Petitioner cites the seven-page document as asserting '[redacted] FL[,] is considered an economically depressed area with a 19.5% poverty rate (2019 actual), translating to 1 in 5 people living in poverty, compared with 10.5% nationally. The poverty rate does not take into account the impact of COVID-19 that could dramatically affect the 2020 rate when published."[2] However, as noted above, the document does not address any particular area. Specifically, it does not opine on whether [redacted] is considered economically depressed, what [redacted]'s poverty rate is, and what the national poverty rate is. Additionally, as noted above, the Petitioner's reference on motion to COVID-19, which began in 2019, addresses facts that did not exist at the time of filing in 2018 and, therefore,

[2] Specifically, the Petitioner cites the URL for the webpage submitted as a printout in the record. We reviewed both the seven-page document in the record and the actual webpage.

may not establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

On motion, the Petitioner also submits a printout of a webpage article titled, [redacted] which notes that it was written "9 years ago." The article is published by [redacted] and it generally discusses sports fans in the [redacted] metropolitan area, attendance at sporting events, and Florida in general. The article contains a four-sentence summary of a "quarterly Consumer Distress Index released Wednesday by the nonprofit credit counseling agency CredAbility, noting that "[n]o other major metropolitan area is as stressed out as [redacted] when it comes to the combined factors of a rough job market, tight credit, household budget constraints, lower net worth and, most significantly, a lousy housing market." The summary also noted that "[o]ut of the top 25 metros [redacted] was not only most financially distressed, but it also was the only major metro in the bottom-rung category of 'Emergency Crisis.'" However, the [redacted] article's four-sentence summary of the credit counseling agency's quarterly index does not provide current information regarding the extent to which [redacted] may be economically depressed while the Petitioner pursues the endeavor.

Moreover, although *Dhanasar* notes endeavors "particularly in an economically depressed area," the focus of national importance is on whether the endeavor has "significant potential to employ U.S. workers or has other substantial positive economic effects." *Id.* at 890. Accordingly, the issue of whether [redacted] is economically depressed is secondary to whether the endeavor has significant potential to employ U.S. workers or have other substantial positive economic effects. The Petitioner did not submit any new evidence on motion to establish whether the endeavor has significant potential to employ U.S. workers or have other substantial positive economic effects. Therefore, without more, the probative value of whether [redacted] was economically depressed "9 years ago" or more recently at the time of filing is minimal.

The Petitioner also submits on motion a printout of a webpage titled '[redacted]' which provides information about that area. As noted above, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. The Petitioner's reference on motion to COVID-19, which began in 2019, addresses facts that did not exist at the time of filing in 2018 and, therefore, may not establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. We also take administrative notice that the area addressed in the document is [redacted], a suburb southeast of [redacted] along Florida's eastern coastline, not [redacted] a suburb of [redacted] along Florida's western coastline, where the Petitioner resides and indicates in her business plan where she will pursue the endeavor. Therefore, even if the document could establish eligibility, it does not present a new fact material to the endeavor.

In summation, the Petitioner has not presented on motion a new fact that may establish eligibility under the first *Dhanasar* prong.

B. Motion to Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

The Petitioner does not specifically assert on motion that our decision was based on an incorrect application of *Dhanasar* or any other law or policy, based on the evidence in the record of proceedings at the time of the decision. Instead, the Petitioner asserts that "[a] motion to reconsider is a 'request that the USCIS reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked,'" citing *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002). The Petitioner then invites us to reconsider our decision in light of the requirements of the Immigrant Investor Program (EB-5). *See* 8 C.F.R. § 204.6.

The Petitioner not only misquotes *Ramos*, her reliance on it in this circumstance is misplaced. *Ramos* actually states that "[a] motion to reconsider [before the Board of Immigration Appeals (the Board)] is a '"request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked."'" *Ramos* at 338 (quoting *Matter of Cerna*, 20 I&N Dec. 399, 402 n.2 (BIA 1991) (quoting Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 San Diego L. Rev. 79, 90 (1982)), *aff'd*, *Cerna v. INS*, 979 F.2d 212 (11th Cir. 1992)). A motion to reconsider before the Board is governed by 8 C.F.R. § 1003.2(b), which is distinct from a motion to reconsider before the Administrative Appeals Office or any other component of U.S. Citizenship and Immigration Services (USCIS), governed by 8 C.F.R. § 103.5(a)(3) (a motion to reconsider must establish that the underlying decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record at the time of the initial decision). *Ramos* does not indicate that its discussion of a motion to reconsider before the Board applies to a motion to reconsider before USCIS.

Rather than identify an incorrect application of law or policy in the underlying decision, the Petitioner suggests that we should look to the EB-5 program and its job creation requirements for guidance in interpreting the language in *Dhanasar* that indicates a proposed endeavor that has significant potential to employ U.S. workers or provide other substantial positive economic effects, particularly in an economically depressed area, may be understood to have national importance.[3] The Petitioner does not provide any documentation or cite to any policy or case law indicating that these unrelated immigrant programs are analogous or that their provisions are meant to be read in conjunction. Moreover, the Petitioner does not provide any support for the position that the job creation required for eligibility under the EB-5 program reflects the national importance of a proposed endeavor. Nor does she provide documentation to establish that a targeted employment area in the EB-5 program equates to an economically depressed area for consideration under *Dhanasar*.[4] As such, we find no error in failing to do so in our prior decision and decline to do so on motion.

[3] *See* 8 C.F.R. § 204.6(j)(4) (requiring that an EB-5 investor demonstrate that their new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees).

[4] 8 C.F.R. § 204.6(e) defines a targeted employment area as either a rural area or an area that has experienced unemployment of at least 150 percent of the national average.

The Petitioner does not reference any other law or policy that may have been applied incorrectly to the record of proceedings at the time of the decision. Therefore, we affirm that our decision correctly applied *Dhanasar*, and that it was correct, based on the evidence in the record at the time of the decision, under the preponderance of evidence standard.

In summation, the Petitioner has not established on motion that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Because we limited our appeal decision to an analysis of the first *Dhanasar* prong, and because our conclusion on that issue is dispositive, we need not address the Petitioner's assertions on motion regarding the second and third prongs of the *Dhanasar* framework.

III. CONCLUSION

As the Petitioner has not met the requirements for a motion to reopen or a motion to reconsider, we affirm our prior conclusion that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.